

EchoStar's Supplemental Opposition, filed on December 4, 2006 (Docket No. 1094) does not – with minor exceptions discussed below – dispute any of the facts set forth in plaintiffs' filings. (As discussed below, the factual record resolves even EchoStar's minor quibbles against it.) Nor does EchoStar respond to, much less dispute, *any* of the cases cited by plaintiffs, including Eleventh Circuit cases holding that a Court may clarify an injunction to deal with new developments. Finally, for the reasons discussed below, EchoStar cannot dispute that (1) its evasion scheme will, if not stopped, destroy most of the deterrent value of the mandatory remedy for extreme violations of the Act, and (2) the scheme will also vitiate many other key provisions of the Act. The Magistrate Judge should therefore promptly issue a Report & Recommendation urging the District Court to grant plaintiffs' Alternative Motion for Clarification.

THE UNDISPUTED FACTS

EchoStar concedes by its silence virtually all of the facts set forth in plaintiffs' papers – which is no surprise, since the facts come from EchoStar's and NPS' own public statements. In particular, EchoStar does not – and could not – dispute eight of the nine facts recited in plaintiffs' Supplemental Memorandum (Docket No. 1081):

- 1. NPS and EchoStar have repeatedly stated that the purpose of the EchoStar/NPS deal is to provide distant network signals to EchoStar customers who are losing them under this Court's Permanent Injunction.**
- 2. EchoStar and NPS entered into a formal contract for NPS to lease satellite transponder space from EchoStar two days before the December 1 cutoff date.**
- 3. The contract between EchoStar and NPS is overwhelmingly focused on distant network signals.**
- 4. NPS is using an EchoStar satellite to transmit distant signals.**
- 5. NPS is using frequencies licensed by the FCC to EchoStar to transmit distant signals.**

- 6. **Customers will use satellite antennas (or “dishes”) designed and provided by EchoStar -- the same dishes the customers use to receive all other programming from EchoStar -- to receive distant signals from NPS.**
- 7. **Customers will use set-top boxes designed and provided by EchoStar -- the same set-top boxes they use to process all other programming from EchoStar -- to receive distant signals from NPS.**
- 9. **In none of the other “transponder lease” arrangements that EchoStar cites was there an existing court order barring the satellite company from providing the programming in question.**

The only fact that EchoStar even attempts to dispute is this:

- 8. **EchoStar is overtly encouraging its distant-signal subscribers to switch to NPS to obtain distant signals using their existing EchoStar equipment.**

EchoStar contends (at 13-15) that plaintiffs have not accurately conveyed the substance of Mr. Ergen’s recommendations to EchoStar customers about distant signals. Specifically, EchoStar assures the Court that “EchoStar is giving ‘equal billing’ to every available alternative,” including the other major satellite company, DirecTV. Opp. at 14.

To enable the Court for itself to see that EchoStar’s assurance is false, plaintiffs have prepared (as Exhibit 14) a complete transcript of the November 30, 2006 Charlie Chat, as posted (in audio clips) on the web. The following table reprints Mr. Ergen’s full remarks about NPS (d/b/a All American Direct) and DirecTV during the November 30 Charlie Chat:

REFERENCES IN CHARLIE CHAT TO NPS / ALL-AMERICAN DIRECT	REFERENCES IN CHARLIE CHAT TO DIRECTV
<p>“And the third thing that’s a possibility is that there is a new company that is not associated with Dish Network but that has been delivering the distant signals to the C-Band or big dish business for over 10 years now and so actually...they actually were in this business before we were in terms of delivering the signals and been in the business over 20 years. They are currently starting tomorrow uplinking Atlanta and San Francisco to qualified DBS customers. Now one of the advantages to All-American Direct is that you do</p>	

<p>not need new equipment for the most part to receive the signals from your DISH network system, just as many of you Dominion customers out there today don't need new equipment to receive their religious programming from Dominion whose, you know, also up on the same satellite orbital locations we are. The only possible negative here is that broadcasters, of course, for some reason want a monopoly and don't want you to have choice, and they're challenging the right of All-American Direct to actually broadcast that signal to you. Now we think that All-American Direct will prevail in that litigation, but things could change and so what I would do is have you go to their website and contact All-American Direct. It's www.mydistantnetworks.com and go to the website and that's where the most current information will be about qualifying for distant networks there so if you're a B or C customer, that's going to be probably one of your better choices again."</p>	
<p>"All-American is also a possibility for you there. In fact, a very good possibility."</p>	<p>"... and I would be remiss if I didn't say that another possibility is DirecTV. "</p>
<p>"And your only alternative today really would be to contact the new company. Contact them and see if you do qualify, in fact, for that signal."</p>	
<p>"You can reach out to All-American Satellite...All-American Direct, and it's possible you would qualify there because they because they don't broadcast [local channels] ... "</p>	
<p>"The only alternative company who may be able to accept that waiver, again, is All-American Direct. As strange as it sounds because they're not associated with EchoStar, they're in a different position legally. Under the law, to offer distant network signals. So if you enter their website, then you would have to go through the entire waiver process again. It takes at least 30 days because broadcasters have 30 days to either accept your waiver or not, and that's what you'd have to do."</p>	
<p>"Not to be repetitive but your choices are an off-air antenna, lifeline cable, or All-American Direct, to contact them, to get your channel. That's really your options and it's frustrating for me that that's</p>	<p>"...and certainly, DirecTV, our competitor DirecTV is another alternative for you."</p>

the only options you have, but...

You really have two choices there: All-American Direct, who if you send in your...you have to send in your registration and paperwork, but in all likelihood you do qualify. And, in fact, I know as an R.V. owner you would qualify for distant networks. So you certainly could call them.”

Beyond the overwhelming difference in quantity, Mr. Ergen is repeatedly *touting* NPS, while only reluctantly mentioning DirecTV. For example, Mr. Ergen says:

- “Now *one of the advantages* to All-American Direct is that you do not need new equipment for the most part to receive the signals from your DISH network system”
- “[W]hat I would do is have you go to their website and contact All-American Direct. It’s www.mydistantnetworks.com”
- “All-American is also a possibility for you there. In fact, a *very good possibility*.”^{1/}

There is a tenth fact, which plaintiffs believe to be true but that EchoStar and NPS have refused, thus far, to admit:

10. EchoStar has provided NPS (either directly or indirectly) with a list of EchoStar subscribers.

The Court need not resolve this final factual issue to grant the present motion, since the undisputed facts set forth above are far more than sufficient for the Court to do so. But for the reasons set forth in plaintiffs’ Response (Docket No. 1090) to EchoStar’s and NPS’ motion for a hearing, EchoStar almost certainly provided a customer list to NPS. If the Court holds a brief

^{1/} (Emphasis added in all cases) That EchoStar is pushing customers to use NPS, rather than go to DirecTV, to get distant signals is unsurprising: it wants to retain customers for its overall satellite TV package, for which EchoStar collects an average of \$63 per month. See p. 8 below. In other words, EchoStar plainly hopes that, by promoting NPS, it can persuade customers to stick with EchoStar as their primary satellite TV provider so that EchoStar will enjoy larger revenues.

hearing on this matter, it can ask EchoStar and NPS directly; and if the Court permits limited discovery, plaintiffs will, obviously, ask EchoStar and NPS themselves.^{2/}

DISCUSSION

A. EchoStar Does Not Mention, Much Less Distinguish, The Controlling Authorities Cited by Plaintiffs

The facts set forth above demonstrate that EchoStar and NPS are in active concert or participation to violate the Permanent Injunction. If EchoStar contends that the Permanent Injunction is unclear about this, the Court has unchallenged power to make that clear beyond any conceivable doubt. Plaintiffs cited controlling case law to this effect in their Supplemental Memorandum (at 14-15), and EchoStar has no response. *See Hodge v. Dept. of Housing and Urban Dev., Housing Div., Dade County, Florida*, 862 F.2d 859, 861 (11th Cir.1989); *Cook v. The Birmingham News*, 618 F.2d 1149, 1151 (5th Cir. 1980).

Plaintiffs also cited six cases, including a seminal Supreme Court case, holding that an enjoined party may not do indirectly what it is forbidden to do directly. *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945); *United States v. Barnette*, 129 F.3d 1179, 1182, n.5 (11th Cir. 1997); *Roe v. Operation Rescue*, 54 F.3d 133, 139 (3d Cir. 1995); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930); *Mainstream Marketing Services, Inc. v. FTC*, 284 F.Supp.2d 1266, 1277 (D. Colo. 2003); *Hexacomb Corp. v. GTW Enterprises, Inc.*, No. 93 C 3107, 1994 WL 171533, *4 (N.D. Ill. May 2, 1994). EchoStar does not mention, much less distinguish, any of these cases.

Indeed, and strikingly, EchoStar avoids *entirely* any discussion of Fed. R. Civ. P. 65(d), which defines the scope of a federal court injunction; EchoStar mentions the Rule only once, in

^{2/} Plaintiffs yesterday sent letters to both EchoStar and NPS seeking an answer through informal discovery. *See* Exhibit 15. NPS has stated it will respond later today.

passing (at 10). Again, that is no surprise, because, as both the language of the Rule and the cases cited above reflect, its central idea is to prevent enjoined parties from colluding with third parties to defeat injunctions.

The best that EchoStar can do is to cite two cases – both nearly 70 years old – from an Ohio state court. Opp. at 6-8. But those ancient cases, which are of course not controlling in any event, are wholly distinguishable.^{3/} To be comparable here, the *Rowe* cases – about optometry -- would have needed to address a situation in which a company is allowed to continue in the business of optometry, but is enjoined from offering something that many customers expect to receive as part of the package – a glaucoma test. If the enjoined party had contracted with a third party to work in the enjoined party’s optometry premises and use the enjoined party’s glaucoma testing equipment to offer a glaucoma test to the customers while they are getting the rest of their

^{3/} If the old Ohio state court cases *were* on point, the Court should reject them as contrary to settled federal law about preventing evasion of federal court injunctions. See p. 5 *supra* (citing cases).

EchoStar also cites another case, *National Cable*, which construed the term “transmission” in the context of a totally different statute. Opp. at 8-10. But that case had nothing to do with an injunction, nothing to do with Fed. R. Civ. P. 65(d), nothing to do with the “strict” remedy imposed by the Satellite Home Viewer Act for egregious violations, *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348, 354-55 (4th Cir.1999), and nothing to do with a party seeking to destroy the deterrent effect of a mandatory statutory remedy. Nor, obviously, does the *National Cable* court discuss the other ways in which EchoStar’s scheme, if not stopped, would gut the Satellite Home Viewer Act and its successor Acts. See *infra* at 9-10.

Finally, EchoStar suggests that its effort to evade the Permanent Injunction is somehow blessed by the “passive carrier” provisions of the Act, 17 U.S.C. § 119(a)(3). But whatever that provision means in other contexts, it obviously does not permit an enjoined defendant to escape the effects of a “strict” injunction by incorporating the enjoined service as a seamless part of its own offerings. In addition, EchoStar would not qualify for the “passive carrier” exemption in any event since, as discussed above, it is almost certainly exercising “control over the particular recipients of the secondary transmission” by providing its subscriber list to NPS. Nor do EchoStar’s activities – which include relentless “pushing” of NPS to help retain EchoStar’s own customer base – “consist solely of providing wires, cables, or other communications channels for the user of others.” *Id.*

checkup from the enjoined party, the cases might be comparable. And on those facts, even the 1930's Ohio court would have condemned the defendant's ruse.

B. EchoStar's Collaboration with NPS Destroys the Deterrent Effect of the Mandatory Injunction for Egregious Violations of the Act

EchoStar has engaged in a massive, deliberate copyright infringement over many years. As the Eleventh Circuit held: "EchoStar has disregarded the limitations of its statutory license and sought to avoid its obligations under the Act at every turn." 450 F.3d 505, 526 (11th Cir. 2006). For example, in 1999 EchoStar learned that at least 72% of its distant network subscribers were ineligible, but did nothing to turn them off, despite a sworn promise to the Court to terminate service to many of them. *Id.* at 514.

To deter egregious infringements like this, the Act *requires* courts to enter a particularly severe form of injunction when a satellite carrier engages in this type of extreme misconduct. *Id.* at 526-27. In *ABC, Inc. v. Primetime 24* (relied on by the Eleventh Circuit, *id.* at 525), the Fourth Circuit pointed out that the "pattern or practice" remedy was a "deliberate selection of an alternate, stricter remedy for the more serious pattern or practice cases." *See ABC, Inc. v. PrimeTime 24*, 184 F.3d 348, 354-55 (4th Cir.1999). As the *ABC* court explained, "where a carrier flouts the terms of its license in a willful and widespread manner, the penalty is a *strict one*." *Id.* (emphasis added). And the Court of Appeals distinguished SHVA's "unequivocal[]command" *requiring* a permanent injunction from SHVA's provision for "ordinary copyright remedies" where conduct does not rise to the level of a "pattern or practice" of infringement. *Id.*

The "severity" of the injunction comes from *two separate* effects on the enjoined satellite carrier. *First*, the satellite carrier will lose *direct* revenue from the sale of distant signals – around \$5 per month. (This is the only effect that EchoStar discusses in its Supplemental

Opposition; *see* Supp. Opp. at 7, 9.) But *second*, and critically, the satellite carrier will *lose all of its revenues from many customers who cancel their overall subscriptions because they are unable to obtain distant signals from the satellite carrier*. And the impact of losing a *customer* is much larger – for EchoStar, currently an average of \$63 per month, or \$756 per year.^{4/} With 900,000 subscribers in play, the revenue impact on EchoStar is enormous.

Far from being in dispute, EchoStar itself has repeatedly told the Court exactly this. *See* [EchoStar's] Emergency Motion to Stay the District Court's Permanent Injunction Pending Appeal at 17, & Moskowitz Declaration at ¶ 9 (11th Cir. Filed Nov. 8, 2006) (“If subscribers prematurely lose their network programming, many of EchoStar's subscribers *are likely to cancel their remaining satellite services and are likely to tell others not to do business with EchoStar.*”) (Docket No. 1081, Exhibit 11); EchoStar's Sealed Proposed Findings of Fact & Conclusions of Law, ¶ 324 (May 5, 2003) (“Many of EchoStar's subscribers whose distant network programming . . . Plaintiffs ask to be disconnected *are likely to cancel their remaining satellite services with EchoStar as a result.*”) (emphasis added in all cases).

It is *this* effect of the Permanent Injunction – the larger effect – that EchoStar has schemed to neutralize through its collaboration with NPS. By being able (through its work with NPS) to offer distant signals to its customers seamlessly, using exactly the same equipment, EchoStar will – if this Court does not act – effectively nullify the “severe” injunction mandated by Congress.

Indeed, EchoStar's Opposition unwittingly concedes that a “reasonabl[e] constru[ction]” of the Act requires that this financial benefit to EchoStar be taken away by the Permanent

^{4/} Transcript of EchoStar Earnings Call (Nov. 7, 2006), available at <http://media.seekingalpha.com/article/20082>.

Injunction. EchoStar says this: “The purposes of the statutory remedy, and the Permanent Injunction embodied by it, may reasonably be construed to include: . . . (3) *denying EchoStar the revenue that would result from providing distant network channels to its consumers.*” Opp. at 4 (emphasis added). Yet if EchoStar’s scheme is not stopped, EchoStar will *retain* the bulk of the revenue from “providing distant network channels to its consumers” -- namely, the \$63 per month (on average) that it receives from customers who stick with EchoStar rather than, as EchoStar repeatedly told the Court would happen, “cancel[ing] their remaining satellite services” from EchoStar.

This is not a matter of “punishing subscribers,” as EchoStar repeatedly contends (at 10, 11). Of course, plaintiffs regret any inconvenience to subscribers caused by EchoStar’s lawbreaking.^{5/} But if EchoStar can use its collaboration with NPS to dodge the customer-retention impact of the Permanent Injunction, it will have negated the principal impact of the mandatory remedy and have destroyed the effectiveness of the mandatory pattern-or-practice injunction as a deterrent.

C. EchoStar’s Scheme Is Totally Inconsistent with the Structure of the Act

EchoStar’s pretense that it has nothing to do with NPS’ delivery of distant signals to its subscribers – despite providing the satellites, frequencies, satellite dishes, and set-top boxes that NPS uses, and despite actively selling NPS to its customers to serve its own business interests – if accepted, would not only shred the mandatory pattern-or-practice remedy of the Act, but would also render meaningless many other requirements added by Congress in 2004.

^{5/} Contrary to EchoStar’s repeated accusations, the Affiliate Associations did exactly what they were required to do under their proposed settlement with EchoStar. Once the District Court rejected that settlement, however, it was void and the Affiliate Associations had no obligation to revive it.

The background is this: statutory licenses, as an exception to the exclusive rights of copyright owners, are intended to be narrowly crafted to achieve their purposes. As satellite carriers like EchoStar have rolled out *local-to-local* service (including ABC, CBS, Fox, and NBC stations) since 1999, the need to obtain *distant* ABC, CBS, Fox, and NBC stations has correspondingly been eliminated. In rewriting the Act in 2004, Congress recognized this point, in a set of provisions under the heading “Replacement of Distant Signals with Local Signals.” See SHVERA, § 24, Public Law 108-447, 118 Stat. 3416 (2004), available at www.fcc.gov/mb/policy/shveredec2004.doc. Most notably, starting in 2004, satellite carriers have been barred from signing up new customers for distant analog stations if their satellite carrier offers local-to-local service in the customer’s area. 47 U.S.C. § 339(a)(2)(C). But EchoStar’s scheme would make that provision a nullity: EchoStar (or any other satellite carrier) could vitiate its obligations under the if-local-no-distant provision by the simple pretense of “contracting out” to a third party the use of the satellite carrier’s satellite, frequencies, satellite dishes, set-top boxes, and other facilities to deliver distant signals. In other words, EchoStar – an adjudicated infringer that has engaged in a “‘pattern’ and ‘practice’ of violating the Act in every way imaginable,” 450 F.3d at 526 – would by this scheme have effectively gutted two of the central provisions of the Act.

Conclusion

For the reasons described above and in plaintiffs’ Supplemental Memorandum of Law (Docket No. 1081), the Magistrate Judge should recommend that the Court enter the proposed Order submitted by plaintiffs.

Respectfully submitted,

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December 6, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2006, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/David M. Rogero/

SERVICE LIST

CBS Broadcasting Inc. v. EchoStar Communications Corp.

Case No: 98-CIV-DIMITROULEAS / SELTZER

United States District Court, Southern District of Florida

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

Case No. 98-2651-CIV-Dimitrouleas/Seltzer

CBS BROADCASTING INC., et al.,)
)
Plaintiffs,)
)
v.)
)
ECHOSTAR COMMUNICATIONS)
CORP., et al.,)
)
Defendants.)
_____)

**[PROPOSED] ORDER GRANTING PLAINTIFFS' ALTERNATIVE
MOTION FOR CLARIFICATION OF THE PERMANENT INJUNCTION**

On the Motion of plaintiffs filed on December 1, 2006, in consideration of the relevant filings by other parties, and for good cause shown, it is hereby ORDERED that the Permanent Injunction dated October 20, 2006 is hereby CLARIFIED to the following effect: without limiting the generality of the prohibitions contained in the Permanent Injunction, the Injunction bars EchoStar from leasing or otherwise making available its satellite facilities for retransmission of distant network stations by third parties to EchoStar customers.

DONE AND ORDERED this _____ day of December 2006 in Chambers in Fort Lauderdale, Florida.

United States District Judge